

ENVIRONMENTAL LAW AND JUSTICE CLINIC**ENVIRONMENTAL LAW AND JUSTICE CLINIC**

November 26, 2013

National Freedom of Information Officer
U.S. Environmental Protection Agency
Submitted via *FOIA Online*

***Re: Freedom of Information Act Request Regarding EPA's Evaluation of
Lead Emissions from General Aviation Aircraft Engines***

Dear Freedom of Information Act Officer:

On behalf of Friends of the Earth ("FoE"), Earthjustice and the Environmental Law and Justice Clinic ("ELJC") at Golden Gate University School of Law submit this request for information pursuant to the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552, and the Environmental Protection Agency ("EPA" or "the Agency") FOIA regulations, set forth at 40 C.F.R. Pt. 2. This request focuses on information related to EPA's evaluation of lead emissions from general aviation aircraft engines and the extent to which these emissions cause or contribute to air pollution which may reasonably be anticipated to endanger the public health or welfare.

FoE requests a fee waiver for this request.

I. Background

On October 3, 2006, FoE submitted a petition for rulemaking ("the Petition") to EPA that sought a finding by the Agency regarding the contribution of lead emissions from general aviation aircraft engines to lead air pollution which may reasonably be anticipated to endanger public health or welfare. EPA formally responded to the Petition on July 8, 2012 and indicated that it would continue developing "basic factual information about the levels of lead in the air at and around general aviation airports" by modeling air monitoring data and combining the results of such modeling with updated demographic information. *See* ENVIRONMENTAL PROTECTION AGENCY, Memorandum in Response to Petition Regarding Lead Emissions from General Aviation Aircraft Piston-Engines, July 8, 2012, sec. III, p. 5 ("EPA's Petition Response"). Thereafter, on April 8, 2013, FoE submitted FOIA Req. No. HQ-2013-005276 ("FOIA Request No. 1"), requesting documents contained in thirteen

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separate categories and requesting a waiver of fees for each. Initially, EPA entirely denied FoE a fee waiver for its FOIA Request. FoE appealed. In a letter dated July 3, 2013, EPA responded to FoE's Fee Waiver Appeal ("EPA Fee Waiver Appeal Response"). In that determination, EPA partially reversed its initial finding and granted FoE's fee waiver request for categories 1-3, 5, and 10-11. EPA affirmed its fee waiver denial for categories 4, 6-9, and 12-13. *See* EPA Fee Waiver Appeal Response, p. 6. FoE retracted from FOIA Request No. 1 categories 4, 6-9, and 12-13, and requested the immediate release of remaining documents requested in FOIA Request No. 1.

In response, records were disclosed by the EPA on August 30, 2013, September 30, 2013, and November 1, 2013. As explained by Meredith Pedde, EPA only disclosed "those records in its possession at the date the request was received, which in this case was April 8, 2013." *See* e-mail from Meredith Pedde, Office of Transportation & Air Quality, EPA, to FoE, July 17, 2013.

II. Records Requested

For purposes of this request, the term "record" means information of any kind, including, but not limited to, documents (handwritten, typed, electronic, or otherwise produced, reproduced, or stored), letters, e-mails, facsimiles, memoranda, correspondence, notes, databases, drawings, graphs, charts, photographs, minutes of meetings, electronic and magnetic recordings of meetings, and any other compilation of data from which information can be obtained.

FoE requests that EPA make available the following two sets of records:

INFORMATION SET A ("Set A")

As to each of the following categories (encompassing Categories 1-3, 5, 10-11) of records requested in FOIA Request No. 1, please provide all responsive records dated or created after April 8, 2013, or those that came into EPA's possession following April 8, 2013:

1. All records related to monitoring data about the levels of lead in the air at and around general aviation airports, as referenced in EPA's Petition Response, sec. III, p. 5, ¶ 2, p.6, ¶ 1, p. 9, ¶ 3.
2. All records related to EPA's development of a model used to characterize the levels of lead in the ambient air at and around airports and all records related to the factual characteristics of airports used to create EPA's model, as referenced in EPA's Petition Response, sec. III, p. 5, ¶ 2.
3. All records related to the 2011 National Emissions Inventory for lead emissions from piston-engine aircraft, as referenced in EPA's Petition Response, sec. III, p. 7, ¶ 1.
5. All records not already requested related to the "modeling work [that] will be completed in 2012," as referenced in EPA's Petition Response, p.10. ¶ 2.

10. All records related to EPA's current demographic analysis and evaluation of environmental justice among the populations residing in close proximity to airports with piston-engine aircraft activity, as referenced in EPA's Petition Response, p.10, ¶ 4.

11. All records related to EPA's "1-year monitoring study (of 15 additional airports)," including monitoring data and analyses, which were conducted to "allow EPA to determine whether certain airports have the potential to cause the surrounding areas to exceed the revised 2008 lead National Ambient Air Quality Standards ("NAAQS"), as referenced in EPA's Petition Response, p. 12, ¶ 2.

However, records of an administrative nature are not requested. Records pre-dating April 28, 2010 are not requested. Lastly, records that are publicly available are not requested.

INFORMATION SET B ("Set B")

FoE requests the following categories of information, originally requested in FOIA Request No. 1 as Categories 4, 6-9, 12-13; numbered similarly as in FOIA Request No. 1 here, but revised and listed as 4-b, 6-b, etc. for purposes of this FOIA Request. More specifically, FoE requests that EPA make the following information and the following records available:

4-b. All case studies that have been or will be used in the modeling effort to evaluate the impact of fly-in events on ambient air concentrations and of lead emissions from DC-3 and DC-6 aircraft, as referenced in EPA's Petition Response, p. 10, ¶ 1.

6-b. All records and/or data EPA has collected that have been or will be directly used "to evaluate... the deposition of lead emitted by piston-engine aircraft" on the environment, as referenced in EPA's Petition Response, p. 10, ¶ 3.

7-b. All records and/or data EPA has collected that have been or will be directly used "to evaluate... concentrations of lead in fish and the potential role of lead emissions from piston-engine aircraft," as referenced in EPA's Petition Response, p. 10, ¶ 3.

8-b. All records and/or data EPA has collected that have been or will be directly used "to evaluate... the potential role of weekend increases in piston-engine aircraft activity on weekend increases in ambient lead concentrations," as referenced in EPA's Petition Response, p. 10, ¶ 3.

9-b. All records and/or data EPA has collected that have been or will be directly used "to evaluate... lead concentrations reported in runoff water at airports; concentrations of organic lead in air from piston-engine aircraft emissions; and the potential impact of lead emissions from piston-engine aircraft used in the cultivation of crops for human consumption," as referenced in EPA's Petition Response, p. 10, ¶ 3.

12-b. All records related to EPA's next-stage of review of the lead NAAQS, which specifically relate to avgas emissions, as referenced in EPA's Petition Response, p. 12, ¶ 3.

13-b. All records related to the actions taken by EPA discussed in EPA's Petition Response, cumulatively referenced at p. 14, ¶ 1, p. 15, ¶ 1, which are not part of EPA's lead emissions from piston-engine aircraft docket, EPA-HQ-OAR-2007-0294, or otherwise publicly available.

However, records of an administrative nature are not requested. Records pre-dating April 28, 2010 are not requested. Lastly, records that are publicly available are not requested.

III. Exemptions from Disclosure

If EPA believes that certain documents are exempt from required disclosure, please exercise your discretion to disclose them nevertheless in accordance with the Attorney General's March 2009 FOIA memorandum, reiterating President Obama's directive that in "the face of doubt, openness prevails." Attorney General, Memorandum for Heads of Executive Departments and Agencies, at 1 (March 19, 2009). We expect that EPA will apply a presumption in favor of disclosure and consider that it "should not withhold information simply because it may do so legally." *Id.* Should you determine that any records may be withheld under FOIA's narrow exemptions, please identify each allegedly exempt record in writing, provide a brief description of that record, and explain the Agency's justification for withholding it. This explanation should take the form of a *Vaughn* index, as described in *Vaughn v. Rosen*, 484 F.2d 820 (D.C. Cir. 1973) and other related cases. If a document contains both exempt and non-exempt information, please provide those portions of the document that are not exempted from disclosure. Finally, if a document does not exist, please indicate that in your written response.

IV. A Fee Waiver is Appropriate

Pursuant to 5 U.S.C. § 552(a)(4)(iii) and 40 C.F.R. § 2.107(l), FoE requests that EPA waive all fees associated with responding to this request because FoE seeks this information in the public interest and will not benefit commercially from this request.

FOIA provides that fees shall be reduced "if disclosure of the information is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government and is not primarily in the commercial interest of the requester." 5 U.S.C. § (a)(4)(iii). EPA's FOIA regulations contain a nearly identical requirement, 40 C.F.R. § 2.107(l)(1), and identify six factors to assess whether a requester is entitled to a waiver of fees under FOIA, *id.* § 2.107(l)(2).

FoE's requests for (1) Set A and (2) Set B each comply with every factor EPA weighs in a fee waiver determination, as demonstrated below.

A. FoE's Requests for Information are in the Public Interest.

1. The Information Requested in Set A is in the Public Interest.

FoE has requested EPA make available updated information for categories of documents requested in FOIA Request No. 1, encompassing Categories 1-3, 5, 10-11, referred to cumulatively as Set A as described on pp. 2-3, *supra*.¹ On July 3, 2013, EPA determined that FoE had met its burden in showing that the information requested in FOIA Request No. 1, Categories 1-3, 5, 10-11 were in the "public interest" and completely waived fees for all of those categories. Here, FoE is requesting updated information responsive to those identical requests.

More specifically, in waiving fees for documents requested in FOIA Request No. 1, EPA concluded:

1. That "the subject of the request concern[ed] the activities or operations of identifiable governmental activities, *i.e.*, the activities of EPA, since EPA is statutorily charged with evaluating and promulgating rules and regulations governing lead emissions from aviation aircraft pursuant to 42 U.S.C. § 7571" and "[a]ccordingly, [FoE has] made the required showing under this condition" for this prong of the fee waiver test. *See* EPA Fee Waiver Appeal Response, p. 3.
2. That the requested records "provide[s] information related to the results of EPA's investigation of determining whether lead emissions from generation of aviation aircraft endanger public health or welfare" and that disclosure will "increase understanding on the part of the general public of EPA's investigation and evaluation of the impacts of lead emissions from aviation on the human health and the environment." *See* EPA Fee Waiver Appeal Response, p. 4.
3. That disclosure of the documents requested would likely contribute to the public understanding, *i.e.*, the understanding of a "reasonably broad audience of persons interested in the subject, as opposed to the individual understanding of the requester," taking into account the requester's expertise in the subject area and its "ability and intention to effectively convey information to the public." 40 C.F.R. § 107(l)(2)(iii). *See* EPA Fee Waiver Appeal Response, p. 5 ("you have met the test for the third condition").
4. That for "paragraphs 1-3, 5, and 10-11...[FoE] ha[s] explained specifically how the requested information will contribute to the public's understanding of government operations or activities to a significant extent by showing how disclosure of monitoring data about levels of lead in the air at and around general aviation

¹ FoE submitted FOIA Request No. 1 on April 8, 2013 and requested a fee waiver for all categories of documents requested. EPA initially denied FoE's request for a fee waiver on April 9, 2013. On May 6, 2013, FoE appealed EPA's fee waiver denial. In response to FoE's appeal, EPA completely waived fees for all documents requested for categories 1-3, 5, 10-11. As indicated by Meredith Pedde in correspondence dated July 17, 2013, EPA limited its search for records pursuant to FOIA Request No. 1 to documents in its possession on or before April 8, 2013. *See* e-mail from Meredith Pedde, Office of Transportation & Air Quality, EPA, to FoE, July 17, 2013.

airports, EPA's development of a model to evaluate levels of lead in the ambient air, 2011 National Emissions Inventory for lead emissions from piston-engine aircraft, EPA's demographic analysis of environmental justice among airports with piston-engine aircraft, and EPA's 1 year monitoring study of 15 additional airports will advance public comprehension of the results of EPA's investigation of determining whether lead emissions. The degree of public understanding of the results of EPA's investigation will be significantly augmented by the additional knowledge concerning impacts of lead emissions from aviation on human health and the environment that will be provided to the public by the disclosed documents. [FoE] ha[s] therefore met [its] burden..." See EPA Fee Waiver Appeal Response, p. 5 (citing *Judicial Watch, Inc. v. DOJ*, 122 F. Supp. 2d 13, 19 (D.D.C. 2000)).

In sum, EPA stated that FoE met its burden in establishing that for Categories 1-3, 5, 10-11, FoE met "its burden with respect to all four conditions of the public interest prong of the fee waiver test" and concluded that "release of the requested documents would serve the public interest." See EPA Fee Waiver Appeal Response, p. 6. Since the legal standard is the same, the information requested in the same, and EPA has already found that this information is "in the public interest" for purposes of a fee waiver, it follows that the information requested in Set A meets the standard for the public interest prong of the fee waiver test.²

Because the categories of information requested in Set A are *identical* to those requested in revised FOIA Request No. 1, it follows that fees should be waived for Set A, which is a request for the same categories of information dated or created after April 8, 2013, or those that came into EPA's possession following April 8, 2013. As explained, the information requested in Set A meets all four prongs of the public interest test under FOIA and EPA's guiding regulations.

2. The Information Requested in Set B is in the Public Interest.

FoE has requested EPA make available information for categories of information contained in Categories 4b, 6b-9b, 12b-13b, referred to cumulatively as Set B as described on pp. 3-4, *supra*. The information requested in Set B is in the public interest because it complies with each of the four factors EPA weighs when making a fee waiver determination, as explained below.

a. The Information Requested in Set B Concerns the Operations or Activities of EPA.

When determining whether a FOIA request is in the public interest, EPA first examines whether the information requested concerns "identifiable operations or activities" of the federal government with a "connection that is direct and clear," and "not remote." 40 CFR § 2.107(l)(2)(i). EPA is a federal agency statutorily charged with evaluating and promulgating rules and regulations governing lead emissions from general aviation aircraft. See 42 U.S.C. § 7571. Here, the information and data FoE is requesting concerns (1) EPA's evaluation of lead emissions from general aviation aircraft engines, (2) the extent to which such emissions cause or contribute to air pollution which may reasonably be anticipated to

² FoE hereby incorporates its May 6, 2013 FOIA Appeal of Fee Waiver Denial, and the arguments made therein. Since the arguments made in FoE's May 6, 2013 Appeal of Fee Waiver Denial pertain to *exactly the same categories of documents* requested here, FoE incorporates these arguments accordingly.

endanger public health or welfare, and (3) EPA's decision whether to regulate these emissions based, in part, on the results of this information. Thus, there is a direct connection between the information FoE is seeking and EPA's operations and activities. The requested records therefore directly and clearly concern "operations or activities of the government," as they are the direct product of EPA's operations and activities and will be used to fulfill EPA's statutory mandate under 42 U.S.C. § 7571. *See* 40 C.F.R. § 2.107(l)(2)(i); *see also* *Citizens for Responsibility & Ethics in Washington v. U.S. Dep't of Health & Human Servs.*, 481 F. Supp. 2d 99, 107-08 (D.D.C. 2006) ; *Judicial Watch v. Dep't of Transp.*, Civ. No. 02-566-SBC, 2005 WL 1606915, at *3-4 (D.D.C. July 7, 2005).

Moreover, the records are being requested with reasonable specificity. *See Judicial Watch, Inc. v. Rossotti*, 326 F.3d 1309, 1313 (D.C. Cir. 2003) (citing *Larson v. Cent. Intelligence Agency*, 843 F.2d 1481, 1483 (D.C. Cir. 1988) (To satisfy the first prong of a fee waiver request, government operations or activities must only be identified with "reasonable specificity—which is all that FOIA requires"). Here, FoE is requesting records related to activities EPA stated it was taking in its July 8, 2012 Response to FoE's Petition for Rulemaking. *See supra*, pp. 3-4; *see also* EPA's Petition Response, *passim*. Since EPA stated that it was undertaking all of the activities described in this FOIA request, there is a direct and "reasonably specific link" between the activities and operations of EPA and the records requested here.

Further, EPA conceded that the information requested in FOIA Request No. 1 met the first prong of the public interest requirement. EPA stated in its July 3, 2013 Response to FoE's FOIA Fee Waiver Appeal, "the subject of the request concerns the activities or operations of identifiable government activities, i.e., the activities of EPA, since EPA is statutorily charged with evaluating and promulgating rules and regulations governing lead emissions from aviation aircraft pursuant to 42 U.S.C. § 7571. Accordingly, [FoE] ha[s] made the required showing under this condition *for all paragraphs* of your FOIA request." *See* ENVIRONMENTAL PROTECTION AGENCY, FOIA Fee Waiver Appeal EPA-HQ-2013-006189 Response, July 3, 2013, at 3 ("EPA Fee Waiver Appeal Response") (emphasis added).³

- b. The Disclosure of FoE's Request for Information by EPA is "Likely to Contribute" to an Understanding of Government Operations and Activities.

EPA next examines whether disclosure of the records in FoE's request is "likely to contribute" to an "understanding of government operations or activities." 40 C.F.R. § 2.107(l)(2)(ii). To satisfy this factor, the disclosed records "must be meaningfully informative" and "likely to contribute . . . to an increased public understanding of those operations or activities." *Id.* Information that is not "already . . . in the public domain, in either a duplicative or a substantially identical form" is considered more likely to contribute to an understanding of government operations or activities. *Id.*

Here, the records FoE requests will provide FoE and the public with meaningful information related to EPA's investigation of determining whether lead emissions generated by aviation aircraft endanger public health or welfare. Case studies used to develop modeling and

³ Although FoE has refined its request for information regarding categories 4, 6-9, 12-13 (now referred to as 4b, 6b-9b, 12b-13b), the information requested still concerns the operations and activities of EPA as the requested information is substantially similar to that requested in FOIA Request No. 1.

monitoring efforts that measure lead emissions, as well as lead concentrations at various locations, *e.g.*, will help FoE and the public understand EPA's ongoing evaluation of lead emissions from general aircraft and to what extent these emissions cause health and welfare risks, or contribute to air pollution. Disclosure of these records will ultimately increase public understanding of EPA's investigation and assessment of the impact of lead emissions from aviation on human health and the environment. *Rossotti*, 326 F.3d at 1313-1314.

The information requested in parts 4b, 6b-9b, 12b-13b will specifically inform the general public of the results of EPA's *particularized* investigations that it stated it was undertaking in response to FoE's 2006 Petition. The scientific information and data requested will help the public understand how EPA will reach, if at all, determinations or conclusions concerning lead emissions from piston aircraft. EPA stated in its EPA Fee Waiver Appeal Response that disclosing "case studies" will "not inform the public of EPA's decision whether to regulate this emissions source." *See* EPA Fee Waiver Appeal Response, p. 4. However, case studies that inform how EPA monitors and models lead emissions at airports does in fact relate directly to EPA's endangerment evaluation. For example, the public has a legitimate interest in knowing whether EPA is using an outdated, incomplete or otherwise faulty model. The public has a legitimate interest in understanding what information and study parameters EPA relies on in reaching any substantive determinations regarding the impact of leaded aviation gas on public health and welfare. The public has a legitimate interest in understanding if EPA's substantive determinations fully take into account the results of case studies EPA has deemed necessary to reach such a determination.

EPA also stated in its response to FoE's Appeal that "records related to EPA's search and collection of various data focus on the process-related information rather than substantive basis for EPA's evaluation and decisions." *See* EPA Fee Waiver Appeal Response, p. 4. However, FoE has amended its request and is now seeking information that is not process related, but will be directly used by EPA to evaluate endangerment. *See e.g.*, Category 9-b, (requesting "All records and/or data EPA has collected that *have been or will be directly used* 'to evaluate... lead concentrations reported in runoff water at airports; concentrations of organic lead in air from piston-engine aircraft emissions; and the potential impact of lead emissions from piston-engine aircraft used in the cultivation of crops for human consumption' ") (emphasis added). Specifically, all records and/or data EPA has collected that have been or will be directly used to evaluate the lead concentrations reported in runoff water at airports, for example, will be meaningfully informative as to the risks related to lead emissions for areas in close proximity to airports, and will provide an increased public understanding of how EPA evaluates that risk. Records and/or data EPA has or will rely on to evaluate the potential impact of lead emissions from piston-engine aircraft used in the cultivation of crops for human consumption will provide an increased public understanding of how EPA factors into account the dangers of lead on crops, soil and land as result of lead emissions. Since these factors will all play a role in EPA's endangerment evaluation, disclosure of the information is "likely to contribute" to an understanding of EPA's operations and activities.

All of this information will also allow FoE and the public to evaluate whether EPA is properly acting under its statutory mandate. *See* 42 U.S.C. § 7571; *see also* *U.S. Dep't of Justice v. Reporters Comm. For Freedom Of The Press*, 489 U.S. 749, 773 (1989) (FOIA's purpose concerns citizens' rights to be informed about "what their government is up to" and

“[o]fficial information that sheds light on an agency’s performance of its statutory duties falls squarely within that statutory purpose” (quoting *Env’tl. Protection Agency v. Mink*, 410 U.S. 73, 80 (1973) (Justice Douglas, dissenting)). Here, disclosure concerns not only records related to public health or welfare, but specifically concerns records related to EPA’s fulfillment of its mandate under the Clean Air Act. 42 U.S.C. § 7571.

Further, FoE has not requested any information that is already publicly available. Thus, the requested information is not “duplicative” or otherwise available in “substantially identical form.” 40 C.F.R. § 2.107(l)(2)(ii). Because the requested information will contribute to an understanding of EPA’s decisions regarding its statutory duties under 42 U.S.C. § 7571, and is not otherwise publicly available, the sought records are likely to contribute to an understanding of government operations and activities. As a result, FoE satisfies the second public interest factor because the requested information in Set B will contribute to an understanding of EPA’s decisionmaking under its statutory duties, and is likely to contribute to an understanding of EPA’s evaluation of the subject in coming to a determination.

c. Disclosure of the Records FoE Requests Will Help Inform the General Public.

To determine whether a fee waiver is justified, EPA’s third consideration is whether the “contribution to an understanding of the subject by the public is likely to result from disclosure” and states that the “disclosure must contribute to the understanding of a reasonably broad audience of persons interested in the subject, as opposed to the individual understanding of the requester.” 40 C.F.R. § 2.107(l)(2)(iii); *Carney v. U.S. Dep’t of Justice*, 19 F.3d 807, 814–15 (2d Cir.1994) (“The relevant inquiry . . . is whether the requester will disseminate the disclosed records to a reasonably broad audience of persons interested in the subject”). Moreover, a “requester’s expertise in the subject area and ability and intention to effectively convey information to the public” is considered under this requirement. 40 C.F.R. § 2.107(l)(2)(iii).

First, a reasonably broad audience is interested in the risks posed by the largest source of airborne lead emissions in the country. This “broad audience” is demonstrated by the over 350 comments submitted in a recent rulemaking docket related to this very issue. See EPA Rulemaking Docket No. EPA-HQ-OAR-2007-0294. The commenters represented a diverse spectrum of interests, including pilots, industry groups, interested states and cities, individuals living near airports, public health advocates, and environmental groups. *Id.* EPA’s failure to regulate lead emissions from aircraft also has been the focus of various media reports.⁴

⁴ For just a few examples, see e.g., Sarah Zhang, *Leaded Fuel Is a Thing of the Past—Unless You Fly a Private Plane*, MOTHER JONES (Jan. 10, 2013 4:06 AM), <http://www.motherjones.com/blue-marble/2012/12/-private-planes-still-use-leaded-gasoline>; Cahal Milmo, *Made in Britain: The Toxic Tetraethyl Lead Used in Fuel Sold to World’s Poorest*, THE INDEPENDENT (Jan. 14, 2013), <http://www-independent.co.uk/news/uk/home-news/made-in-britain-the-toxic-tetraethyl-lead-used-in-fuel-sold-to-worlds-poorest-8449967.html>; *Does the Continued Use of Lead in Aviation Fuel Endanger Public Health and the Environment?*, SCIENTIFIC AMERICAN (Sep. 3, 2012), <http://www.scientificamerican.com/article.cfm?id=lead-in-aviation-fuel>.

Here, release of the requested records will contribute to the public's understanding of EPA's decisionmaking regarding the regulation of aircraft lead emissions. EPA has estimated that 16 million people reside and 3 million children attend school in close proximity to airport facilities where lead emissions from aircraft engines are released. FoE members and their families, including young children, who are especially vulnerable to harm from lead exposure, live, work, play, and attend school near airports where leaded avgas is used and lead is emitted into the air. Some FoE members live in areas near airports where lead is emitted and that EPA has classified as "nonattainment" for lead due to their failure to meet the Agency's own health-based National Ambient Air Quality Standards. The people living close to these airports have substantial interests in ensuring that any EPA decision regarding the regulation of lead emissions is made transparently and in accordance with applicable law.

Moreover, FoE, given its long history and expertise in environmental advocacy, is particularly able to ensure that the requested information will be disseminated to the general public. FoE is an environmental advocacy organization founded in 1969, with approximately 170,000 members and activists across the nation, including more than 100,000 online activists and newsletter subscribers. FoE is dedicated to defending the environment and championing a healthy and just world by protecting against environmental degradation and promoting clean air and healthy communities. To this end, FoE has advocated for improved air quality nationwide through, among other things, environmental activism, public education, litigation, and participation in agency hearings. For the past ten years, FoE has devoted resources towards reducing pollution that results from the use of leaded fuel by aviation aircraft.⁵

In light of its substantial experience with air quality, public education, litigation, and information dissemination, FoE is well prepared to analyze and evaluate the records received pursuant to this request and assess them in the context of the statutory mandates of the Clean Air Act. To this end, FoE has the expertise, "ability and intention" to convey this information to the public, and specifically, persons interested in the subject. 40 C.F.R. § 2.107(l)(2)(iii). Under the guiding regulations' plain language, that is sufficient to satisfy this prong of the test. *See also Carney*, 19 F.3d at 814–15 (the "[i]nformation need not actually reach a broad cross-section of the public in order to benefit the public at large The relevant inquiry . . . is whether the requestor will disseminate the disclosed records to a reasonably broad audience of persons interested in the subject").

Furthermore, FoE at large will be taking numerous steps to disseminate the requested information to the public, and have demonstrated and longstanding capacity to do so. FoE will distribute this information to FoE's 250,000 members and activists through its website, email lists, mailers, and direct communications, all of which are available free of charge to interested parties. FoE will additionally disseminate and promote this information via social media—which in total currently comprises more than 100,000 followers. FoE will also make this information available to traditional media through direct communication to journalists, press releases, telephone-based and traditional press conferences, phone calls

⁵ For example, in 2003, FoE initially raised the issue of the potential of lead emissions from the use of leaded gasoline in general aviation aircraft engines to cause or contribute to endangerment of public health or welfare. In 2006, FoE petitioned EPA for a formal rulemaking with respect to lead emissions. In 2011, FoE filed a complaint seeking to compel EPA to make an endangerment finding.

and emails to reporters, media interviews, newsletters both posted to our respective websites and mailed and emailed to interested members of the public and media, social media accounts, and those testifying at public meetings. All above named venues for the dissemination of this information are provided free of charge to the public.

This type of dissemination has been held sufficient to satisfy this prong of the fee waiver determination. *See Judicial Watch, Inc. v. Gen. Servs. Admin.*, CIV.A. 98-2223 (RMU), 2000 WL 35538030, at *9 (D.D.C. Sept. 25, 2000) (holding that an organization satisfied FOIA's requirement that information be disseminated to a reasonably broad segment of the public where the organization had established history of dissemination information, and proposed to post disclosed information for public review on its Internet web-site); *see also D.C. Technical Assistance Org., Inc. v. U.S. Dep't of Hous. & Urban Dev.*, 85 F. Supp. 2d 46, 49 (D.D.C. 2000) ("In this Information Age, technology has made it possible for almost anyone to fulfill" FOIA's dissemination requirement); *see also Or. Natural Desert Ass'n v. U.S. Dep't of Interior*, 24 F. Supp. 2d 1088, 1095–96 (D. Or. 1998) (held organization established a prima facie case that "contribution to public understanding" was significant where organization sought a fee waiver request for monitoring data and gave a "lengthy articulation of its reasons for requesting the information," explained "what it would do with that information," "how they would disseminate" it and "to whom") (relying on Dep't of Interior FOIA Regulations' test articulated and explained in *Friends of the Coast Fork v. U.S. Dep't of the Interior*, 110 F.3d 53, 55–56 (9th Cir. 1997)).

Because FoE is particularly informed and able to disseminate this information to a sufficiently broad and interested audience, disclosure of the requested information will "contribut[e] to an understanding of the subject by the public." 40 C.F.R. § 2.107(l)(2)(iii). As a result, FoE thus satisfies the third factor used to determine whether a fee waiver is justified for information Set B.

d. The Information Requested by the FoE Will Contribute "Significantly" to Public Understanding of Government Operations and Activities.

The fourth factor EPA considers is whether the records requested "is likely to contribute 'significantly' to public understanding of government operations or activities." 40 C.F.R. § 2.107(l)(2)(iv). *Fed. CURE v. Lappin*, 602 F. Supp. 2d 197, 205 (D.D.C. 2009) (the relevant test is whether public understanding will be increased after disclosure, as opposed to the public's understanding prior to the disclosure). Where information is not currently available to the general public, and where "dissemination of information... will enhance the public's understanding," the fourth public interest factor is satisfied. *Fed. CURE*, 602 F. Supp. 2d at 205.

The records FoE requests in information Set B will contribute "significantly" to the ongoing public conversation about the need to protect the public from the adverse health impacts attributable to lead exposure from this significant source or airborne lead emissions by disclosing information that is otherwise not currently available. *See id.* at 205–06 ("availability of the requested information prior to disclosure must also be considered Here, the information requested is not even in the public domain; it does not have an existing 'threshold level of public dissemination,' as the public currently has no access to it, accordingly current availability of the information is not a bar to the plaintiff's fee waiver

request”). The requested records are not currently available, yet EPA believes they are critical to determining the impacts of lead emissions from aviation on human health and the environment.

In its July 8, 2012 Response FoE’s Petition for Rulemaking, EPA stated that it did not yet have enough information to determine whether lead emissions from generation aviation aircraft endanger public health or welfare, and thus is evaluating “both the likelihood or risk that a harm could occur to the public health or welfare, and the severity of this harm if it were to occur.” *Id.* EPA explained that it now faced an “intensive investigation,” the results of which “will provide a major part of the scientific basis that EPA plans to use in making a judgment on endangerment and contribution” under section 231 of the Clean Air Act. *Id.* at 5. Here, FoE has requested specific parts of EPA’s investigation, which will help inform EPA’s decisionmaking process. This information is not currently available to the general public.

In EPA’s Fee Waiver Appeal Response to FOIA Request No. 1, EPA stated that FoE failed to explain how the information at issue will allow the public to critically evaluate EPA’s decisionmaking and provide meaningful input,” and that FoE did not explain how the information “will inform the public about a specific government operation or activity.” *See* EPA Fee Waiver Appeal Response, p. 5. However, the information requested in Categories 4b, 6b-9b, 12b-13b directly concerns the operations and activities of EPA, and will inform the public about EPA’s performance of its job under its statutory mandate.

To illustrate, the information requested in Set B revolves around information used to evaluate lead emissions from aviation aircraft in the environment, such as the deposition of lead emitted by piston-engine aircraft, and concentrations of lead in fish, runoff water at airports, lead in air, and the potential impact lead emissions from piston-engine aircraft have on the cultivation of crops for human consumption. This information requested will allow FoE and the public to critically evaluate the scientific information which will ultimately play a role in whether EPA finds endangerment. The public has a legitimate interest in understanding the scope of, and any limitations to, EPA’s studies. For example, data the government has collected on lead concentrations in runoff water at airports and the effects of lead emissions from piston-engine aircraft on the cultivation of crops for human consumption relate specifically to whether EPA determines that lead emissions cause or contribute to pollution that can reasonably be anticipated to endanger the public health or welfare. If, for example, these documents indicate that lead emissions from aviation aircraft contribute significantly to water and crop contamination, the public’s knowledge and ability to critically evaluate EPA’s actions under the Clean Air Act will be enhanced significantly. If the EPA has not studied that issue, the public has a legitimate interest in knowing that fact. Similarly, the public has a legitimate interest in knowing whether EPA develops data in studies that is not ultimately reflected in any determination EPA makes regarding the health impacts of leaded aviation fuel.

Moreover, these records will directly advance public comprehension of EPA’s investigations and any determinations related to aviation emissions because they will significantly contribute to an increased understanding of EPA’s decisions governing such issues. If EPA has yet to undertake or study these issues, this informs whether EPA is timely moving forward with its investigation, as it stated in its Response to FoE’s 2006 Petition.

If EPA does not ultimately propose emission standards, release of case studies and data regarding lead levels at various locations will enhance the public's understanding of why EPA has not moved forward doing so, and empower the public to petition EPA to take action. Without these materials, the public will not, for instance, understand what information formed the basis for EPA's eventual decisions regarding the regulation of aircraft lead emissions. Given that EPA has admitted that "[i]t is difficult to specify . . . how long the development of a proposal for lead emissions would complete to take" and has not committed to any firm deadline, the public has an important and particularized interest in receiving this information promptly. *See* EPA's Petition Response, p. 17.

With the guidance and expertise of FoE, the release of this information will contribute significantly to the public's understanding of actions EPA stated it was undertaking in order to fulfill its statutory mandate. *See* 42 U.S.C. § 7571; *see also* EPA's Petition Response, *passim*.

Due to the fact that the currently unavailable requested information will significantly enhance the public's understanding of EPA's actions and decisionmaking regarding lead emissions from piston-engine aircraft, FoE satisfies the fourth factor used to determine whether a fee waiver is justified for Set B. Indeed, "Congress amended FOIA to ensure that it be 'liberally construed in favor of waivers for noncommercial requesters.'" *Rossotti*, 326 F.3d. at 1312 (quoting 132 CONG. REC. 27,190 (1987) (Sen. Leahy)).

In sum, the information requested in Set B meets all four prongs of the public interest test under FOIA and EPA's guiding regulations.

B. FoE has No Commercial Interest in the Requested Information.

EPA regulations identify two factors in assessing whether the requested information is primarily in the commercial interest of the requester and thus less likely entitled to a fee waiver. First, EPA assesses the "existence and magnitude of a commercial interest," and second EPA addresses whether the disclosure is "primarily in the commercial interest of the requester." 40 C.F.R. § 2.107(l)(3)(i)-(ii).

Here, FoE is a tax-exempt environmental 501(c)(3) advocacy organization. FoE has no commercial, trade, or for-profit interests in the information requested. FoE seeks to use this information solely to inform the public about EPA's actions regarding lead emissions from general aviation aircraft engines and to support advocacy efforts around protecting the public from health risks posed by exposure to ambient lead. FoE plans to disseminate this information free of charge to the public. Thus, there is no relevant commercial interest here, and the request is entirely in the public interest. Given the non-profit nature of FoE, its limited financial resources, and all of the foregoing reasons, a fee waiver is warranted. 5 U.S.C. § 552 (a)(4)(A)(iii).

Further, in EPA's Response to FoE's Fee Waiver Denial Appeal, EPA acknowledged that FoE met these prongs for categories 1-3, 5, and 10-11 because "the request (was) not primarily in the commercial interest of the requester." *See* EPA Fee Waiver Appeal Response, p. 6. Thus, because categories 1-3, 5, and 10-11 have already been found to not be in the commercial interest of FoE, the remaining categories are also not in the commercial

interest of FoE because FoE's interest in requesting all categories is the same, and is not a commercial interest.

C. FoE's Requests for Information in Sets A and B Warrant a Fee Waiver.

FoE has successfully met each factor EPA uses in determining whether a fee waiver is justified under FOIA for both Information Set A and Information Set B. The requested records concern the activities or operations of government; are not requested for commercial purposes; and will provide the public with meaningful information that addresses EPA's evaluation of ambient lead emissions from general aviation aircraft engines under its statutory mandate. Given that FOIA's fee waiver provision is to be "liberally construed in favor of waivers for noncommercial requesters" such as FoE, the forgoing reasons demonstrate that a fee waiver is clearly warranted. *McClellan Ecological Seepage Situation v. Carlucci*, 835 F.2d 1282, 1284 (9th Cir. 1987). Thus, FoE respectfully requests EPA waive fees for all FOIA categories requested.

V. Instructions for Record Delivery

To the extent that the requested records are available in a readily-accessible electronic format, we prefer to receive records electronically, either by e-mail or on a CD. If electronic copies are unavailable, we will accept paper copies. Please send the requested records to Ashley Pellouchoud at the address listed below. We trust that, in responding to this request, EPA will comply with all relevant deadlines and obligations set forth in FOIA and in EPA's FOIA regulations. In the event EPA concludes that some of the records requested above may already be publicly available, FoE requests that EPA direct us to their respective locations.

Thank you for your assistance processing this request. Please contact Ashley Pellouchoud if you have any questions.

Best Regards,

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